

APPROVED MINUTES  
CITY OF MILPITAS

Minutes:	Regular Meeting of Milpitas City Council
Date of Meeting:	March 1, 2005
Time of Meeting:	6:00 p.m. (Closed Session 7:00 p.m. (Public Business))
Place of Meeting:	City Hall Council Chambers, 455 E. Calaveras Blvd.

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**ROLL CALL**

Mayor Esteves called to order the regular meeting of the Milpitas City Council at 6:00 p.m. Present were Mayor Esteves, Vice Mayor Gomez, and Councilmembers Giordano, Livengood, and Polanski.

**CLOSED SESSION**

Mayor Esteves publicly stated the Council would convene in Closed Session to discuss the following two items listed on the agenda:

1. Public Employee Performance Evaluation/Appointment  
(Pursuant to Government Code Section 54957)  
Title: City Attorney
2. Conference with Labor Negotiators  
(Pursuant to Government Code Section 54957.6)  
Unrepresented employee: City Manager

Mayor Esteves adjourned the meeting to closed session at 6:01 p.m.

The City Council meeting reconvened at 6:29 p.m. with Mayor Esteves presiding and Vice Mayor Gomez and Councilmembers Giordano, Livengood, and Polanski present.

**CLOSED SESSION  
ANNOUNCEMENTS**

City Attorney Steven Mattas reported the Council approved, at his request, the appointment of Richard Pio Roda as Interim City Attorney through the end of April at Mr. Mattas' request; the vote was 4 to 1 with Mayor Esteves voting no on that matter. Mr. Mattas further reported the second item involved labor negotiations involving the City Manager, an unrepresented employee; the Council, by a 3 to 2 vote, with Councilmember Polanski and Mayor Esteves voting no, approved a 10 percent out-of-class pay for the Interim City Manager retroactive to the first day he took over as Interim City Manager and also authorized 10 days of Administrative Leave that must be used during the 2005 calendar year and could not be cashed in if not used.

Mayor Esteves commented that regarding the first announcement, it was not that he was against Mr. Pio Roda; his preference had been Jane as her resume showed well established accomplishments, she had been the City Attorney for Oakland for approximately 10 years, and he felt she could do a good job as well. Mayor Esteves stated that in regard to the City Manager, he had voted no because the increase was approximately \$19,000 and felt at this time, it was difficult for the City to approve that kind of increase; the increase would be more than the previous City Manager's pay, which was \$203,000; union negotiations were coming and he did not want to give the perception that the City was setting stage for a 10% increase for everybody; he was also concerned that people might think that some bribery was being done, to which he would disagree.

Vice Mayor Gomez said he put the item regarding the out-of-class pay increase on the agenda because he felt Mr. Lawson should be treated like any other employee who worked out-of-class; it was standard practice of the City to pay 10 percent to any employee working out-of-class; Mr. Lawson did not have a \$100,000 severance package, did not live in a \$700,000 home that the City paid for as the previous City Manager had, and there was also a savings due to the fact that Mr. Lawson's position as Police Chief was not being back-filled, and that was why he had voted for the out-of-class pay.

Councilmember Livengood commented that there were a number of people within the City of Milpitas who were currently receiving 10% out-of-class pay, and he thought it only fair that Mr. Lawson be treated the same way the other City employees were treated; he thought it was

fair, that Mr. Lawson was doing a very good job as City Manager, and Mr. Lawson was saving the City a significant amount of money (the Police Captain's position created when Tom Nishisaka became Chief of Police and the Assistant City Manager's position were not being filled); the extra \$19,000 or whatever the number worked out to be was a relatively small amount compared to the savings Mr. Lawson was generating for the taxpayers; he felt that people should be awarded when they stay and they work hard and do a good job; and thought it was a matter of fairness, and that was his reasoning in supporting the request.

Councilmember Giordano said what she had brought up in Closed Session was the fact that there is no package attached to the Interim City Manager; he was merely working out-of-class. Councilmember Giordano recalled that during the years she worked at the City doing payroll, 10 percent was being paid for working out-of-class; it had been a common practice in the City for many years; and she felt very comfortable giving that opportunity to the current Interim City Manager.

## **WORK SESSION**

Councilmember Livengood announced that he would be abstaining from the Work Session as well as items 15 and 18 on the agenda because they all related to KB Homes in one way or another, and he formerly worked for KB within the last year. Councilmember Livengood left the dais.

Acting Planning Manager James Lindsay reported this was a work session and just a preliminary concept and as such, no action was being asked of the Council; KB would be making a presentation on the preliminary concept to redevelop the 23 acre site owned by the School District; representative of the School District were present to comment on the proposal; the property was currently zoned Industrial Park, and introduced Ray Panek with KB Homes to make the presentation.

Ray Panek, KB Homes, presented their preliminary concept for the site commenting that if there was consensus tonight, they would then make the investment to refine the plan.

Vice Mayor Gomez inquired about park land dedication; Councilmember Giordano commented on the need to include the nearby residents in the process and said she would have a problem without having some kind of park without the land and addressing the concerns of the existing neighbors. Councilmember Polanski inquired how they would get beyond the lease and what was taking place with the School District.

Dr. Karl Black, MUSD Superintendent, said they conferred with their legal advisor and an exchange could be made; housing would bring new students and would benefit the District in that regard because 400 students had been lost in the last five years costing the District \$2 million; and the District hoped that the Council would move forward with this concept.

Mayor Esteves inquired about affordable housing. Mr. Panek said they were looking at that as part of the economic analysis and had included a percentage of moderate housing. Mr. Lindsay said the project site was located outside the Midtown Specific Plan area and outside the Redevelopment area, but the City had been very successful in negotiating at least 20 percent affordable housing from recent developments.

Vice Mayor Gomez inquired about the accessibility of the parkland to the open space and how useable it would be; how practical and easy it would be to walk over there.

Mike Mendizabal, Chair, MUSD School Board, commented on the 1996 \$65 million School Bond Measure that was leveraged into \$200 million in improvements and the need to keep their facilities in good shape. Mr. Mendizabal said this was an opportunity for the School District, an opportunity to keep Elmwood as it is, and an opportunity to create housing. Mr. Mendizabal further stated it would also continue the School District's partnership with the City, and to work this out with a developer where all the parties could walk away with something good.

Mayor Esteves expressed concern for housing adjacent to the freeway. Mr. Panek said they would have an acoustic study prepared and most likely there would have to be a masonry wall.

Dhaval Brahmbhatt, Economic Development Commissioner, said he thought the logic was good but if you look at where the two freeways intersect, it was a prime commercial location so rather than putting the two dealerships in the backside and homes in the front and then putting sound barriers, put the commercial property up front.

#### **PLEDGE**

Members of Troop No. 92 led the Council and audience in the Pledge of Allegiance.

#### **MINUTES**

MOTION to approve the City Council minutes of February 15, 2005, including joint meeting with the Redevelopment Agency, as submitted.

M/S: Gomez, Giordano. Ayes: 4 Absent: 1 (Livengood)

Councilmember Livengood returned to the dais at 7:04 p.m.

#### **SCHEDULE**

Councilmember Polanski announced that the Council CIP Subcommittee's next meeting was scheduled for March 30, 2005, at 6:00 p.m.

MOTION to approve the Schedule of Meetings as amended.

M/S: Gomez, Polanski. Ayes: 5

#### **PRESENTATIONS**

Mayor Esteves announced that he had signed a proclamation declaring March 14-19, 2005, as "Science Fair Week," sponsored by the Santa Clara Valley Science and Engineering Fair Association, and the proclamation had already been forwarded to the Association.

Mayor Esteves read a proclamation proclaiming March 2005 as "American Red Cross Month" and presented it to Karen Borgstrom, Associate Director of Disaster Services of the American Red Cross. Ms. Borgstrom thanked the Mayor and Council for acknowledging the important role the American Red Cross plays in the community in preventing, preparing for, and responding to emergencies. Ms. Borgstrom shared a story as an example of the many different kinds of services provided by the Red Cross through the generous contributions of local citizens and the support of cities like Milpitas.

#### **CITIZENS FORUM**

Mayor Esteves invited members of the audience to address the Council on any subject not on the agenda, requesting that remarks be limited to two minutes or less.

Mari Tustin, Senior Vice President, John Stewart Company, asked if procedurally, the Council would like to hear her comments regarding Terrace Gardens at this time or would she have an opportunity to speak when the item is considered. Mayor Esteves responded that she should address the Council when the item was heard.

Krista Potter, Milpitas, shared her experience since February 2000 in receiving a Federal Housing Rehabilitation Loan administered by the City of Milpitas, the City's refusal to allow Ms. Potter and her husband to act as their own general contractor, and the contractor's breach of contract with them. Ms. Potter said she did not agree with paying the contractor in full before things were made right, City staff was informed that they preferred to hire another contractor to finish the job and correct the problems, City staff would not agree to that and she and her husband were told the loan money would be frozen and not allowed to be used until it was agreed that a check to Rooney Construction would be signed. Ms. Potter further stated Rooney Construction filed bankruptcy and was no longer in business, and the City wanted her to pay Rooney Construction directly rather than a trustee; for the past five years, the City had been holding in excess of \$25,000 that belonged to her; she and her husband hired an attorney and spent about two years writing letters; and after two years, she ran out of money to pay the attorney and was now asking for the Council's help.

Vice Mayor Gomez requested background information from staff on the issue, along with any communications with Mrs. Potter, and to inform the Council on the details and any course of action that might be taken to resolve the matter.

## **ANNOUNCEMENTS**

Councilmember Polanski said she had the opportunity to attend the Milpitas Senior Center renovation open house on February 25, 2005, and was impressed with the remodel, along with the Senior Center staff and seniors who were there, and thought it was going to be a great benefit to the community.

Councilmember Giordano, referring to the Community Advisory Commission (CAC) agenda for March 2, 2005, said she had not seen a discussion of invocations on the agenda and inquired when that would occur. Councilmember Polanski responded the CAC would be hearing approximately 19 CDBG presentations that evening and usually when the CAC holds the CDBG hearings, they try not to have many other things on the agenda; however, the invocation would be coming back.

Councilmember Giordano reported that in an effort to increase applicants to the City's Youth Advisory Commission, she had contacted Milpitas High School and on Wednesday, she would be addressing the High school's Leadership Class to recruit Leadership applications and next week, she would be making an announcement over the school's broadcast system to the entire student body and would be leaving applications at the school.

Mayor Esteves said he had attended the services for firefighter Captain Mark McCormack; he had joined the walk for Tsunami in Milpitas and thanked all those who walked with him; thanked the City's Police Services for providing police escorts for the walk; and he had attended the Bay Area United, sponsored by Milpitas based organizations, to raise funds for the Tsunami disaster. Mayor Esteves further stated he had asked Acting City Manager Lawson for a presentation on the next agenda on his recommended plan for the upcoming union negotiations including a time schedule, what parties would be involved, and suggested looking at salary surveys for each position and also retirement benefits.

Vice Mayor Gomez, referring to the union negotiations, said he wanted to give forewarning that if during that presentation he sensed that any issues were strictly "meet-and-confer" issues and could jeopardize any of the City's negotiations, he would immediately request that the discussion be tabled.

Mayor Esteves said he was asking for a plan of approach and something that should not be in Closed Session.

## **ANNOUNCEMENT OF CONFLICT OF INTEREST**

City Attorney Mattas inquired if any member of the City Council had a Conflict of Interest, to disclose it for the record stating that Councilmember Livengood had previously stated that he would be abstaining on items 15 and 18 based on his prior relationship with KB Homes South Bay; if there were any further items, he would ask the Council to identify them now. There were none.

## **MOMENTS OF REFLECTION**

Mayor Esteves stated this was to do with the City's Ethics Program and inquired if there were any comments from the Council. There were none.

## **AGENDA**

Vice Mayor Gomez asked that items 10 and 11 be moved to the front of the agenda since they were items carried over from the previous meeting.

MOTION to approve the agenda, including the supplemental agenda item 9A, as amended by moving items 10 and 11 to after the Public Hearings.

M/S: Livengood, Gomez.

Ayes: 5

## **CONSENT CALENDAR**

Mayor Esteves inquired if anyone wished to make any changes to the Consent Calendar.

Vice Mayor Gomez said he didn't see present in the audience the resident who removed item 6 from the Consent Calendar at the last Council meeting and suggested that it be added to Consent.

Councilmember Polanski requested items 12 and 13 be removed for discussion.

Councilmember Livengood suggested item 9 be added with the recommendation to approve the request for the fee waiver. Mayor Esteves inquired why the request was being made now when the event took place in January. Fire Marshal Patti Joki responded that the individual was out of the country and unable to attend the Council meeting until tonight. Mayor Esteves said he did not have a problem placing the item on the Consent Calendar with the recommendation to approve the waiver.

MOTION to approve the Consent Calendar, items with asterisks on the agenda, as amended by the addition of items 6 and 9 and the removal of items 12 and 13, in accordance with the staff recommendations.

M/S: Gomez, Livengood.

Ayes: 5

**\*6.  
Digital Voice Recorder  
(CIP No. 3389)**

Approved the purchase of a voice logger/recorder for the 9-1-1 Emergency Communications Center from Voice Print International Inc., in an amount not to exceed \$33,637.39. (Funds are available in the Enhanced Public Safety Project, [CIP#3389]).

**\*7.  
Gateway Sign Pilot Project  
(Project No. 4227)**

1. Approved Option 1 concept design for the Piedmont at Landess location.
2. Approved new CIP Project No. 4227 for the Gateway Sign Pilot Program and appropriation of \$20,000.00, which includes solar lighting, into this project from the Street Fund.

**\*8.  
Girls Softball Teams**

Approved the Mayor's recommendations for a contribution of \$500.00 from the Council's Community Promotions budget to the North Valley Milpitas Bobby Sox for financial support of the Girls Softball teams to participate in this year's Nationals Tournament in Hawaii

**\*9.  
Fee Waiver**

Waived permit and inspection fees, in the amount of \$468.00 for the "Chinese New Year Flower Fair" event to be held by the Chinese American Chamber of Commerce on January 29 and 30, 2005.

**\*14.  
Athletic Court Rehabilitation  
Phase II (2005)  
(Project No. 5069)**

1. Rejected lowest bid by R&M Paving Contractors Inc, as the low bidder had requested to be relieved of the bid due to mathematical error in their bids, and awarded Construction Contract to National Surfacing Company, Inc. in the amounts of \$419,244.14 and \$185,806.05 (base and additive bids respectively) for a total of \$605,050.19.
2. Approved a budget appropriation in the amount of \$100,000 from the Park Fund.

**\*15.  
Great Mall Parkway/I-880  
Capacity Improvements  
(Project No. 4178)**

1. Authorized the Acting Assistant City Engineer to execute the Contract Change Order to Granite Construction in the amount of \$16,805.
2. Approved Agreement Amendment with Korve Engineering the amount of \$27,195, subject to approval as to form by the City Attorney.
3. Approved a budget appropriation for \$100,000 from KB Infrastructure Fund. (Councilmember Livengood abstained.)

**\*16.  
RBF Consulting - Alviso Adobe  
(Project No. 5055)**

Authorized the City Manager to execute the amendment agreement with RBF Consulting, in the amount of \$21,160.00, for updated environmental studies, subject to approval as to form by the City Attorney.

**\*17.  
Urban Runoff Pollution  
Prevention Program**

Approved and authorized the City Manager to sign the First Amendment to the Memorandum of Agreement for the Santa Clara Valley Urban Runoff Pollution Prevention Program.

**\*18.  
Hetch-Hetchy**

Authorized the City Manager to execute the permit with the City and County of San Francisco for the Use of the Hetch-Hetchy Right-of-Way for Public Parks Associated with the Elmwood

- Right-of-Way** Development at a cost of \$2,023.88 per month (with an annual CPI adjustment) for use of the right-of-way. (Councilmember Livengood abstained.)
- \*19.  
Dyett & Bhatia  
Urban and Regional Planners** Approved Amendment No. 1 to the Consulting Services Agreement Between the City of Milpitas and Dyett & Bhatia Urban and Regional Planners to require additional public meeting attendance at a cost of \$3,960, bringing the not-to-exceed amount of the original contract to \$107,030, and postponing the final Council presentation to April 5, 2005.
- \*20.  
Proliant Servers** Awarded the bid for the purchase of five (5) Proliant DL 380 servers to Surah, Inc. in the amount of \$27,776.95.
- \*21.  
Miscellaneous Vendors** Approved the following purchase requests:
1. \$300,000 increase to Purchase Order 3481 to Meyers Nave for fiscal year 2004-2005 for Public Works construction litigation expenses including attorney's fees, costs and expert witness fees. (Funds are available in the City Attorney's operating budget for these services.)
  2. \$5,063.90 to LC Action for Streamlight M3X AR15 gun lights and mounting hardware. The budget appropriation was approved by Council on January 18, 2005. (Funds are on deposit and available as part of the State COPS grant for 2005).
  3. \$4,316.85 to Lincoln Equipment, Inc. for the purchase of a new Maxi-Sweep 5.5 HP pool sweep for the Milpitas Sports Center. The old equipment outlived its useful life and was no longer worth repairing. (Budget appropriation is needed from the Equipment Fund for this purchase).

#### **PUBLIC HEARINGS (None)**

#### **UNFINISHED BUSINESS**

- 10.  
Commissioner Outreach  
Program** City Clerk Gail Blalock reported this item was in response to a request from Councilmember Giordano for ways of improving outreach to encourage more residents to apply for appointment to the City's Commissions; the Council had received a memo listing what was currently done, some ideas and suggestions from other cities, and a list of suggestions of ways to implement a more extensive outreach program at a minimal cost. Ms. Blalock added to the list of suggestions creating some larger posters for display at various locations, including the SAFE Program graduates to the mailing lists since they are people who have already demonstrated an interest in serving their community, and utilizing the City Hall/Community Center electronic message board on Calaveras. Ms. Blalock also commented that one of the difficulties over the years was that Commissioners' terms expire at different months throughout the year which made recruitment efforts difficult and suggested changing the terms so they would expire at the same time (with the exception of the Planning Commission) would facilitate holding a mass recruitment event.
- Councilmember Giordano thanked Ms. Blalock for the report and said she was pleased with most of the additional items suggested; however, she realized there may be some cost involved in reaching out to the entire community but minor costs could be very reasonable to achieve the goal of greater involvement. Councilmember Giordano said she would like staff to shift some of the current advertising funds to the print press media or radio that reach diverse levels of the community which were more reflective of the community, and she was not in favor of holding an annual open house because it would involve too much staff time.
- Councilmember Livengood said he also appreciated the report, which was thought provoking in some areas; he agreed with the emphasis of creating a little more exciting presentation to people and while the application was functional, he thought coming up with something that had a creative element and that also would include the information needed from people was a good idea.

Mayor Esteves said he thought listing the openings on the agenda was a great idea but questioned the need to publicly announce them. Councilmember Giordano commented that Council meetings are televised and a public announcement would be a key element.

MOTION to direct staff to immediately start implementing all but the last of the ideas (with the exception of holding an open house) to insure there are many current applications and to ask the City Manager to report back by March 15 to inform the Council on the progress made on these items.

M/S: Giordano, Gomez.

Councilmember Polanski said she, too, appreciated the efforts on this; one of the areas brought up was bringing terms of Commissioners to a more central date (maybe two times a year) and noted that a lot of time in talking to Commissioners, they had to look up when their terms expired. Councilmember Giordano said she thought it was an excellent idea although the Council was looking at outreach efforts now but could deal with the term expirations at a different time.

Mayor Esteves asked for a restatement of the motion. Councilmember Giordano restated the motion to direct staff to immediately start implementing all (except the open house) but the last of the ideas to insure there are many current applications and ask that the City Manager report back at the March 15, 2005, meeting to inform the Council on the progress.

Kathryn Manento suggested adding radio and newspapers to the list and writing public service announcements to get it done for free; in her experience, how the announcement was written sometimes would get it done as a public service and that was an angle to watch.

VOTE ON MOTION:

Ayes: 5

## ORDINANCES

### **11. Ord. No. 262.1 Open Government (Introduce)**

City Attorney Mattas reported the item before the Council was the Open Government Ordinance that was coming back for introduction with the changes requested by the Council at its last meeting. Mr. Mattas further reported that in response to the request from Vice Mayor Gomez regarding time-line issues with implementing the requirements of the Ordinance, comments from the Departments were included in the Council's report relative to the six-month time period for the creation of the index records and the departmental web sites and all of the date that would have to go into those documents; staff was asking that the Council consider a longer period of time to accomplish that, suggesting twelve months, and the Information Services Department had identified some time and costs associated with implementation.

Vice Mayor Gomez said he understood the only item that would take time to implement would be the public records index and when he asked the question, he just wanted Mr. Mattas to make sure staff took a look at the entire Ordinance and that the Council gave staff plenty of time to implement everything. Mr. Mattas clarified that the only other item that the Ordinance called for was each department to have a web site, and it called for the placement on those web sites of documents that could be three years old; for staff to be able to pull together all of that information might take up to twelve months and asked the Council's consideration on that issue as well. Vice Mayor Gomez said that since a Commission was being established with this, it would give the Commission time to actually review that and work with staff on implementation, and he had no problem with twelve months.

Mayor Esteves commented that a twelve-month project was a major project and inquired what the budget target was. Information Services Director Bill Marion responded staff would need some definition on what form the index would take and would be looking for some guidance and direction on what the index would look like, and then staff would be able to prepare an estimate; there was a possibility that this would work well with a project that was currently underway for document imaging and the two may be interrelated; however, staff would need

to do a little more analysis on it. Mayor Esteves inquired if Mr. Marion had a ballpark estimate of the range for purely indexing. Mr. Marion responded the question would be to what degree would the index need to go; if it was simply a document, it would be relatively simple and departments would then just add their sections; the maximum could be a full-blown on-line document imaging, and staff thought it was somewhere in the middle.

Councilmember Polanski said this had been discussed in great detail, she appreciated the modifications that were incorporated since the last meeting in some of the areas; she was still concerned that it repealed everything in the current Open Government Ordinance, especially Councilmembers serving as Police Reservists or senior volunteers; she still believed that was bad public policy and knew that an ordinance carried much more weight than a policy; she also noticed that the voting record and attendance provisions of the current ordinance would be eliminated (a member of the community had called that to her attention); she knew that the lobbyist portion of the new ordinance was not as strong as the recommendation from the Community Advisory Commission; and even though she appreciated the modifications of keeping some items from the current ordinance (the 700 Forms and others), she would be voting no on the ordinance.

Councilmember Giordano said she may have gotten the call from the same community member about the compilation of the voting and attendance records and just to make sure nothing was being hid from the public in terms of how the Council voted, she looked into the matter and understood that the minutes were retrievable, so any member of the public could see who was voting, who attended, and what the issue was being voted on, and she did not have a problem with the compilation going away.

Vice Mayor Gomez said Councilmember Polanski and Councilmember Giordano brought up a couple of good issues and when the Commission was established, this should be the first order of business to discuss voting records and also the lobbyist ordinance to see if there was a way to strengthen that; with regard to the index of records and documents, the whole purpose in delaying this for six months (now a year) was for staff to review the Open Government Ordinance, to clearly define it, and determine whether or not this was feasible; and, if it came out that it was going to cost too much, the Council would determine whether or not it should be pursued.

Councilmember Livengood said the first question he had related to the mention of an SOP for the deletion of email after 60 days, when that was adopted, and if anyone had a copy. Mr. Marion said it was adopted in 2000, and he had a copy he could give Councilmember Livengood. Councilmember Livengood said the other thing he wanted to mention briefly was that the Ordinance as proposed went well beyond the current ordinance and does a lot of things that were extremely beneficial to the public.

Mayor Esteves, referring to the portion of the ordinance dealing with an elected official working as a volunteer, questioned if Councilmember Livengood would be able to vote for that portion because he was impacted directly. City Attorney Mattas responded because it was a non-compensated position, Councilmember Livengood could vote on this.

Mayor Esteves said as he stated during the last discussion, he was very uncomfortable with this Open Government Ordinance proposal compared to the current ordinance because of the cost, which was a major unknown; the priority of this kind of expenditure (his priorities were for programs and services to residents); the demand for this system, which was unknown; the collection of documents without a purpose (such as keeping drafts or recordings of Closed Sessions and releasing them when they are useless); questioned the value of keeping records for 10 years; questioned the definition of attendees for Council calendars; and said he didn't think this was being fiscally responsible. Mayor Esteves further stated the only portion he really liked was the three-minute maximum speaking time for speakers, as he had proposed in December, and he could not support the Ordinance.

City Attorney Mattas read the title of Ordinance No. 262.1.



MOTION to waive the reading beyond the title.

M/S: Gomez, Livengood.

Kathryn Manento, Senior Advisory Commissioner, said she was for open government but was very concerned when open government did not follow the California Constitution; and when open government will not explore the costs, something was wrong; if we want to be so open, open up a union for City staff as they deserve it; but, it was too irresponsible not to find out what things are going to cost and to put it on the table for taxpayers.

Mr. Mattas clarified that the final wording of the Ordinance would include the changes to Sections I-310-3.130, the Index to Records, and I-310-3.150, the Departmental Indexes, changing those timelines from six to twelve months. The maker of the motion agreed.

VOTE ON MOTION to waive the reading beyond the title: Ayes: 5

MOTION to introduce Ordinance No. 262.1.

M/S: Gomez, Livengood. Ayes: 3 Noes: 2 (Esteves, Polanski)

## UNFINISHED BUSINESS

### 1. Council Handbook Amendment

City Attorney Mattas reported this item was consideration of an amendment to the City Council Handbook to incorporate the role of the Council Subcommittee related to appointments into the process for the Council's consideration of appointments to task forces, outside agencies, and to City Commissions (liaisons); as was indicated in the staff report, the Council was being asked to provide some direction as to whether or not it wished these amendments to extend to the appointments to boards and commissions.

Councilmember Livengood commented that the current process of appointing Planning Commissioners did not allow the Mayor to make that appointment (Planning Commissioners were appointed by the majority of the City Council), and that ordinance was adopted by the Council 10 years ago; what distinguished that ordinance and that process from other appointments was that State statutes specifically allow the Council to create Planning Commissions and to establish the membership on those Planning Commissions; however, the Government Code provides authority for a directly elected mayor to make recommendations, subject to confirmation of the Council, and says except as provided by Statutes; and the Attorney General had opined that to be State statutes; and so, with the Planning Commission, it actually could be treated separately. Councilmember Livengood further commented on the standing subcommittee consisting of two members of the Council with an advisory role by the Mayor for filling vacancies; this subcommittee would present its recommendations to the Mayor and the Council at a Council meeting at which time the Mayor's concurrence and the recommendations for appointments would be presented to the Council by the Mayor for confirmation; as he read that, it seemed to fit within the guidelines of what Mr. Mattas had written, and he thought that was a permissible process because it recognized that ultimately it was the Mayor who makes the recommendations, with the exception of the Planning Commission. Councilmember Livengood said he just wanted to make sure because it seemed to him that it did fit within those guidelines, and he just wanted to get some clarification.

Mayor Esteves inquired if this basically restricted the choices of the Mayor in terms of recommendations because he knew the Council could not restrict the field of candidates that a Mayor could select from. Mr. Mattas responded the Mayor could still make recommendations from any applicants that the Mayor deemed appropriate; it was then up to the Council as to whether or not they wished to confirm those recommendations. Mayor Esteves questioned the purpose of the subcommittee giving recommendations when all of his colleagues could forward recommendations to him. Mr. Mattas said that was a policy issue for the Councilmembers to consider; the City Attorney's role was to try to develop a process consistent with what the Council had directed.

Councilmember Giordano said she would be supporting this as it clearly talked about the standing subcommittee and its role; however, she questioned if the Council adopted the Open Government Ordinance, would the Council have to enact another change to the Handbook to talk about that commission or to see what kind of changes would be necessary to the Handbook. City Attorney Mattas responded staff would identify the Open Government Commission as one of the commissions in the Handbook.

Councilmember Polanski said she thought that Government Code Section 40605 was very clear; it allowed the Mayor, with the approval of the Council, to make the appointments; it allowed the Council to either accept or reject any of those appointments; and when she read it, it still made no sense to her to have a subcommittee present the recommendations to the Mayor and the City Council at a City Council meeting and, then, with the Mayor's concurrence, the recommendations presented to the Council by the Mayor for confirmation. Councilmember Polanski further stated that to her it was vague, confusing, and usurped the Mayor's authority under State law; she had no problem with the changes to page 4 of the Handbook, which was ad hoc committees and task forces; she had no problem with the changes/additions to page 13, regional boards; but, she would be voting no because of the added level of the subcommittee.

MOTION to approve the amendment to the City Council Handbook in its entirety.

M/S: Giordano, Gomez.

Kathryn Manento said she had to say once again that when dealing with State law, the citizens have to be very concerned about it and that was what the citizens looked for from the Council; cautioned against such a hasty move, and suggested following the Mayor's vision and taking the time to find out what the cost of all this was going to be.

Councilmember Livengood commented so that the public did not get the wrong impression, he had asked the City Attorney earlier in the dialogue whether the proposed changes were a violation of State law, and the City Attorney very definitively answered it was not a violation of State law and was, in fact, still within the guidelines of State law; he did not want to leave the impression that the Council was doing something in violation of State law.

Mayor Esteves said although he was not an attorney, he read simple English; and for him, it was a violation of State law because it attempted to restrict or influence the Mayor in his recommending authority.

VOTE ON MOTION:

Ayes: 3

Noes: 2 (Esteves, Polanski)

**2.  
Terrace Gardens  
Board of Directors  
Application of the  
Brown Act**

City Attorney Mattas said the Council had previously requested an opinion regarding whether or not the City Attorney's Office thought the State law would require that the Terrace Gardens Board of Directors comply with all aspects of the Brown Act; the City Attorney had previously provided a memo to the Council under separate cover; the item before the Council incorporated multiple aspects; the first was a discussion regarding that opinion; the second item was the list of actions and potential staff direction identified in the Council's staff report; and he would first speak to the opinion and then if the Council wanted him to go through the list of additional items, he would do it; if the Council wished to have some discussion or hear from the representatives from Terrace Gardens before getting into the separate discussion, that was in the Council's purview. Mr. Mattas proceeded to explain his opinion that Terrace Gardens comply with the Brown Act and the Attorney General's opinions supporting that opinion.

Councilmember Giordano said she wanted to put a motion on the table to make public the City Attorney's February 9, 2005, opinion on the applicability of the Brown Act's Open Meeting requirements to the Board meetings of Terrace Gardens (make the memo public).

MOTION to make public the City Attorney's February 9, 2005, opinion on the applicability of the Brown Act's Open Meeting requirements to the Board meetings of Terrace Gardens.

M/S: Giordano, Polanski.

Mayor Esteves said before the vote, he wanted one clarification and asked if that meant they could not at all have a closed session if they thought it was appropriate. Mr. Mattas responded any entity that complies with the Brown Act could have closed sessions as provided under the Brown Act (same kind of closed sessions the Council had). Mayor Esteves said that since the following speaker was a part of the discussion, she would not be restricted to two minutes.

Polly Marshall, Goldfarb and Lipman, said she was present as the Attorney for Terrace Gardens, Inc., and wanted to let people know that they were asked back in October 2003 to advise the Board whether the Brown Act applied to Terrace Gardens; it was at a time when they wanted to meet privately to discuss some sensitive financial matters; their interpretation at that time was that it did not apply because Terrace Gardens was not currently receiving funds from the City; a City Councilmember was on the Board, however, the funds were received 18 years ago; and in her opinion, there was nothing in the law that clearly stated Terrace Gardens should comply. Ms. Marshall commented on her memo to the Terrace Gardens Board in October 2003 (and she had copies for the Council) and said she wanted the Council to know that the Board had been operating in good faith, they did what a responsible Board would do and went to legal counsel, they researched it and provided an opinion, and there was not a whole lot of authority on this one way or another. Ms. Marshall again explained that she thought the Board was operating in good faith, there had always been one or more City Councilmembers on the Board and the City Manager (or designee), this issue had never been raised, and they were operating a beautiful, well-run project.

VOTE ON MOTION to make the City Attorney's memo public: Ayes: 5

City Attorney Mattas further explained his opinion detailed in the memo and the conclusion that the Terrace Gardens Board of Directors should comply with the Brown Act.

Mayor Esteves said there were others in the audience who wanted to speak before the Council took action.

Jim Yee, President, Terrace Gardens Board of Directors, shared some history about himself commenting that he was the project architect, got involved in 1985 when Councilmember Livengood was Mayor, he had been on the board for about 10 years, he served with Jim Lawson and Councilmember Polanski during those 10 years; and he wanted to reinforce the fact that the Board acted in good faith relative to the bylaws and what they believed was the law that pertained to their operation. Mr. Yee said they sought the advice of counsel and acted upon that in good faith; and he thought the Board still continued to do that to this day.

Mari Tustin, John Stewart Company (the administrators and management agents for the entire life of this project), said she was not going to speak to the Brown Act as she was staff and so that was out of her purview; but, she wanted to speak to a couple of other items that the Council would have under discussion. Ms. Tustin further stated she thought the 2004 budget had been submitted (item 6); the 2002 and 2003 audits were submitted to the Council and (she believed) were approved on the consent agenda; the 2004 audit was in process and would be submitted in draft form within the next three weeks; with respect to meals, it was very difficult to satisfy the multiplicity of ethnic palates at Terrace Gardens; in the 15 years that she'd been there, they had tried virtually every type of menu and meal service that could be provided, with a very high level of satisfaction; and invited the Council individually to come unannounced at either of the meal servings. Ms. Tustin asked the Council to consider in its actions regarding the Board how devastating it could be in terms of operations and what the residents might experience if they were suddenly without a Board of Directors.

Isaac Hughes said some people might remember that he ran for Mayor although the official fact book published by the City of Milpitas, along with the \$40,000 they spent, never mentioned that fact; when campaigning for Mayor, he went with witnesses and talked to dozens of people at Terrace Gardens and when the people that live there wanted to talk with

him alone in a room, the staff didn't let it happen; they complained about the meals, the games that were locked up and put away, they complained that their mail was controlled, and they all unanimously agreed that they wanted to have a newsletter and that the staff at Terrace Gardens would control that and wouldn't let them create one. Mr. Hughes said he was making a formal request to see all the books for two years ago, he wanted to see all the books of last year, he wanted to go three years back, he wanted to go back to 2002, 2003, 2004, and 2005, and wanted to look at all the salaries, where the funding comes from, how much Milpitas kicks in to run the program, and wanted to know what the plan was for the newsletter the seniors said they couldn't have, he wanted to know how long it would take Terrace Gardens to let him look at their documents that show how they spend their money and how much each gets paid, and wanted to know how many of the staff at Terrace Gardens gave money to people in the last five or six years to run for Council.

Councilmember Giordano said she would begin as she was the one who brought this to light and asked for the City Attorney's opinion; she wanted about five minutes because she thought it was important to set the tone of what she was trying to accomplish. Councilmember Giordano further stated, as the City Attorney had alluded to the fact that his opinion was one that Terrace Gardens may be applicable to the Brown Act, she wanted to quote a few things from the City Attorney's memo and his conclusion that was further supported by a 2002 Attorney General opinion. Councilmember Giordano thanked the City Attorney for his effort and opinion, she understood there was going to be differences between attorneys/differences of opinion; the opinion of the City Attorney was based on interpretation of relevant statutes and guidance from Attorney General opinions and believed that Terrace Gardens should comply with all aspects of the Brown Act; and she wanted to avoid this issue arising again.

MOTION to require that the Terrace Gardens Board of Directors comply with all aspects of the Brown Act.

M/S: Giordano, Gomez.

Kathryn Manento asked Councilmember Livengood when he was Mayor and this came about, what actions did he provide if anything went wrong.

Councilmember Livengood said the question in front of the Council on the first issue was relating to whether the Terrace Gardens Board of Directors should or should not be subject to the Brown Act; he had briefly read the memo to the Board of Directors from Goldfarb and Lipman; he had also read the opinion prepared by the City Attorney; and there was no question in his mind but that this Board did fall under the purview of the Brown Act.

Vice Mayor Gomez asked Mr. Yee what the Board had been discussing in closed session. Mr. Yee responded he recalled the Board had discussed the construction defects (on Jim Lawson's care), appointments to the Board, which was more of a personnel issue, and maybe financial issues. Vice Mayor Gomez questioned how the Board could consider appointments a personnel issue because he thought the people who actually live in that facility and the taxpayers of the City should know the qualifications of the people who are serving on the Board, and asked Mr. Yee to help him understand. Mr. Yee clarified that he was a temporary Board Member for about eight months and just recently elected Board President; he believed this was the procedure the Board had in the past, from Jim Lawson's period, at least when he was on the Board.

Vice Mayor Gomez raised issues regarding the number of Councilmembers serving on Terrace Gardens, the bylaws being changed in 1998 reducing the number of Councilmembers from two to one, and inquired if the bylaws could be changed to limit the number of members on Terrace Gardens. City Attorney Mattas responded one of the issues on the agenda tonight, which he had not researched yet, was the ability to amend the bylaws without having the amendments ultimately approved by the Council; if the Council wanted him to look at it, he could; and he wasn't aware of the amendment to the bylaws that Ms. Marshall had referred to.

Councilmember Livengood said before voting on the motion, he would like to have the question answered about when there's a conflict between the Regulatory Agreement and the bylaws, which document would prevail.

Councilmember Polanski said she believed the Terrace Gardens Board of Directors she'd worked with for the past two years had no objection at all to ensuring that the bylaws and the Regulatory Agreement were completely in compliance; she thought it was stated quite clearly that the Terrace Gardens Board of Directors was acting under good faith; they had been doing what had been done for eight years before she was a member of the board; there were three different opinions now regarding the Brown Act; but she believed that if you asked the Terrace Gardens Board to strictly adhere to the Brown Act, that they would be willing to do that.

Mayor Esteves said he had been reading the contract and the way he interpreted it, Terrace Gardens was really a separate entity from the City.

Councilmember Giordano commented that the bylaws were amended on June 25, 1998, to have only one Councilmember and asked to make those bylaws effective, did they need to be recorded. City Attorney Mattas said it was possible but he would have to confirm it; normally when you do an amendment to bylaws, as he understood it for a corporation, they are filed with the Secretary of State's office but his office, could look into that; he recommended that before the Council took any action relevant to membership, it be looked at.

Polly Marshall said that amendments to Articles of Incorporation were filed with the Secretary of State and amendments to bylaws were simply adopted and kept with the records of the corporation. Mr. Mattas said he could look into that and report back to the Council.

Councilmember Giordano called for the question (regarding the application of the Brown Act).

VOTE ON MOTION: Ayes: 3 Noes: 2 (Esteves, Polanski)

City Attorney Mattas reviewed the second item on the list, the consideration of a request for an amendment to the Terrace Gardens bylaws requiring that any amendments to the bylaws be approved by a majority of the City Council. Mr. Mattas asked the Council to also look at item number 11 on the Supplemental Agenda which restated consideration of the request and direction to the City Attorney to prepare a memo regarding an amendment to the Terrace Gardens bylaws requiring that any amendment be approved by a majority of the City Council and, again, the City Attorney had not issued an opinion on that issue.

MOTION to require any changes to the Terrace Gardens bylaws be approved by a majority of the City Council.

M/S: Giordano, Livengood.

Councilmember Polanski questioned how the Council could do that without first getting direction from the City Attorney on the Regulatory Agreement and the bylaws. City Attorney Mattas said his recommendation to the Council on this issue was that the Council have the City Attorney's office analyze whether or not the Council has the authority to do that. Councilmember Polanski said she would be more than happy to have it analyzed and reviewed and then brought back, if appropriate.

VOTE ON MOTION: Ayes: 3 Noes: 2 (Esteves, Polanski)

City Attorney Mattas said the third item was consideration of the status of Terrace Gardens Board Members appointed in 2004 and 2005; that was also related to item 12, discussion and possible action to remove members of the Terrace Gardens Board of Directors appointed in 2004 and 2005 according to the Corporation's bylaws; and the members appointed in 2004

and 2005, as he understood it, included Don Peoples, Thomas Valore, Ronald Lind, Gerald Rosenquist, Celia Salazar, and Councilmember Giordano.

Councilmember Livengood said the issue, as he understood it, was that for some period of time there had been meetings held outside the privy of the public to appoint and to discuss potential candidates for Terrace Gardens; however, what he was hearing here was that this had been going on for 10 years. City Attorney Mattas clarified that would not include the Councilmember appointees or the City Manager appointee, both of whom were selected by the Council.

Councilmember Giordano said she was looking at just 2004 and 2005 as not being in compliance with the Brown Act; she believed vacancies should be widely publicized, interviews should be made in public, and discussion and appointments should be made in full view of the public; she also understood that the way to rectify these violations of the Brown Act was to redo the actions; in fact, this Council did such an action last year; before making a motion, she wanted to state this was no reflection on the affected Board Members; and should her motion pass, she sincerely encouraged each of the Board Members to apply and participate in the public process required by law.

Councilmember Polanski said she found it very despicable to accuse the Terrace Gardens Board of Directors of violating the Brown Act for the last 15 years, especially in the last two that she served; she felt that was saying that all the Board's actions were null and void; she thought, as it was stated earlier, that the Terrace Gardens Board of Directors had acted in good faith; they were acting based on their attorney's opinion; and just because this Council this evening decided that, by majority, that they have violated the Brown Act based on Ms. Giordano's interpretation, she thought it was appalling to these people who applied and had been giving voluntarily of their time and energy; they were good, professional people and were probably some of the most highly qualified people she had ever seen serving on the Terrace Gardens Board; and she believed this action was very despicable and was very vengeful and if this was the voice of a new government, she was sorry that she was a part of it this evening.

Polly Marshall said as an attorney, she represented a fair number of non-profit housing corporations and said it was not easy to get board members; it was a volunteer position with a lot of responsibility; if the Council took the action tonight that was being considered, the only Board Member left would be Mr. Yee and the Councilmember and the City Manager; and it may not be intended to be personal but it would make it extremely difficult to get Board Members. Ms. Marshall pleaded with the Council, as a member of the public at this point, that it was so harmful to a non-profit and harmful to the residents who live there to have their whole Board fired by the Council and expressed concern what it would do to their peace of mind.

Mr. Yee said he had been associated with the Board for 10 years and there had been difficult times and difficult issues and in some way, it had not been much fun; but, the way he felt right now, to have everything questioned relative to his position on the Board was very difficult; he was appointed 10 years ago and assumed it was the very same process the Board goes through now because the Board had gone through the same process for 10 years with Jim Lawson, with Councilmember Polanski, with the City Manager's designee; the Board acted in good faith with the understanding that those members were in compliance and now the Council was raising questions that the Board was not compliant; and for him to be the last Board Member really was a problem; his profession was based on credibility and he felt right now that his credibility had been questioned for 10 years; the Board did not get paid, they put hours in, they heard residents complain about things, and they still tried to go through its business; and he really did feel like he was being slighted and really questioned about his integrity; and he believed he stood for integrity but felt his integrity had been questioned.

Carmen Montano said she was going to shed some light on how this whole issue came about and described what happened in August 2003 when she applied to be a Board Member. Ms. Montano described how she did not receive a call or feedback from Terrace Gardens; she

asked Mayor Esteves and asked former City Manager Wilson and they didn't know what was going on; she then came before a City Council meeting and read a letter in which she shared her concerns that Terrace Gardens was violating the Brown Act; she sent a letter to the City Manager and the City Attorney; she had not heard from either Terrace Gardens or the City of Milpitas regarding this matter; the bottom line was that she was denied due process in her application and to her being denied that due process, she was considering an attempt to sue for discrimination. Ms. Montano further stated she hoped the Council would restructure and make some major changes on the Terrace Gardens Board.

Kathryn Manento said she stumbled on Terrace Gardens by accident and if they've been in business for 18 years, she had to applaud the Board of Directors because it was absolutely beautiful; to the lady who just spoke, she heard her say she filled out her application and qualified for five out of 10 things needed; and to her, to only have five of the 10 things meant you still had to look for something better. Ms. Manento said Ms. Montano was a lovely lady but she said she only met five of the 10 requirements but she shouldn't take this to heart because everybody is looking for the most qualified to fill the shoes.

Ms. Montano said there weren't any requirements, they were things that they wanted and there were more than five; what really irked her was not so much that she didn't get appointed but that she didn't get a call, she didn't get any response, and it was almost one and one-half years before she got any response and something was wrong with that.

Ernestina Garcia said she had been looking at Terrace Gardens for years because she remembered the first people who brought Terrace Gardens together. Ms. Garcia further stated the Council should take a good look at what was going on here because there was discrimination going on; there was a lot of racism going on of which the Council better open their eyes to it. Ms. Garcia said she disagreed with a lot of stuff going on in this City and the Mayor had better be accountable.

Isaac Hughes said the attorney who spoke commented that they've been doing work with non-profits for a long time, and he wanted to know the name of those other organizations she works for because if she's doing this kind of a job in Milpitas, how many more years and how many things has she contributed to that might need to be looked into. Mr. Hughes further stated he would volunteer for the Board because he didn't fear any of these people.

Kathryn Manento said she hoped Mr. Mattas would agree that he, as well, should just be open right before the people; she agreed with Ms. Garcia about the Mayor being accountable; the Mayor was elected to be our leader but if there are too many chefs in the kitchen/on the bench and nobody wants to follow, then the Mayor cannot be the visionary.

Councilmember Giordano said she did not think this was about personalities but about the actual application process, the screening – about the legalities and about being in an open session adhering to the Brown Act. Councilmember Giordano reminded the Council about the provision in the Regulatory Agreement that the Board of Directors may be removed at the discretion of the majority of the City Council.

MOTION that the 2004/2005 Terrace Gardens Board Members be removed from office.

M/S: Giordano, Livengood.

Tom Valore said he was a recent appointee to the board of Directors; he'd only served on the Board for approximately six months; when he was asked to submit an application, he was under the impression this Board was not a political entity; if he had known he'd be subjected to the kind of treatment going on this evening, if he knew he was going to be lambasted the way he had been tonight, he would not have submitted an application; he had no political aspirations and no reason for being on the Board other than he wanted to serve his community, and that was the basis under which he submitted an application and accepted membership on the Board. Mr. Valore further stated there was an underlying agenda that had not been revealed and he objected to it; it hadn't surfaced, and he would not be removed from the

Board because he'd done something illegal; his business did not allow for something like that so, therefore, he formally submitted his resignation at this particular point in time; and he was sure the Council would get the resignations of other members on the same basis.

VOTE ON MOTION:

Ayes: 3

Noes: 2 (Esteves, Polanski)

## RECESS

Mayor Esteves recessed the City Council meeting at 9:48 p.m. The City Council meeting reconvened at 9:57 p.m.

City Attorney Mattas reported the next item was consideration of providing direction to the City Council Appointment Subcommittee to return with a recommendation for appointing a second Councilmember to the Terrace Gardens Board of Directors as provided for in the Terrace Gardens corporate bylaws; with regard to this item, the Council may wish to consider holding off that direction until they had been advised as to the issue related to the amendment of the bylaws (whether or not there are actually two Council seats on the Board of Directors).

Vice Mayor Gomez said he concurred with the City Attorney that it would probably be beneficial to actually wait to find out what supercedes what, whether it be the bylaws or the Regulatory Agreement.

Councilmember Giordano agreed with that; however, if the City Attorney came back with the opinion that the bylaws didn't apply and that there should be a second appointment from the City, she would like to have that appointment in line to be made quite readily rather than having to go through a lengthy process. Councilmember Giordano inquired if the Subcommittee would be meeting again.

Councilmember Livengood said they did have a published meeting of the Subcommittee; and he believed Mr. Gomez was recommended as the second Councilperson if that came to bear.

Mayor Esteves, addressing Mr. Mattas, inquired if the Mayor had some authority here just like commissioners and board members. Mr. Mattas said his office would report back to the Council on that issue; the appointing document speaks to the appointment of a representative from the City Council, and there were issues he would want to look at to make sure that was clear; ultimately, it would be the Mayor's recommendation.

Mayor Esteves inquired if everyone was in agreement that this part would be skipped for more legal information.

Councilmember Giordano said she would like to make a motion.

MOTION to have the City Attorney prepare direction to the City Council on the applicability of an appointment of a second Councilmember to the Terrace Gardens Board of Directors.

M/S: Giordano, Livengood.

Mayor Esteves stated he was comfortable with the amendment on the bylaws made already, it had been working that way, and he did not see a benefit for the second one.

Councilmember Polanski said her only comment would be there was an amendment to the bylaws made and at that time, Councilmember Jim Lawson approved that amendment; she could assure the Council that after the vote this evening, it appeared that the Terrace Gardens Board of Directors might need a second member of the City Council since there's only one member that was actually left (former City Manager Jim Connolly) and the Councilmember that had been appointed.

VOTE ON MOTION:

Ayes: 3 Noes: 2 (Esteves, Polanski)

Mr. Mattas said the next item was item 5, consideration of directing staff to prepare a status report related to the submission of Terrace Garden annual audit documents for 2002, 2003,



and 2004 to the City; the Council had heard from the representative from the Management Company that the 2004 audit would be forthcoming; and there was reference to the submission of the 2002 and 2003 reports; he could report to the Council that he was aware for sure that the 2002 report had been submitted to the Council, and he would confirm for the Council whether or not the 2003 report had been submitted.

Councilmember Giordano said to move this along, the City Attorney could be directed to review items 5, 6, and 8 and come back with the reports and reviews on those.

MOTION to have the City Attorney review the Corporate bylaws and the Regulatory Agreement with Terrace Gardens to determine the Board of Directors' obligations under both documents to determine any areas of non-compliance by the Board of Directors and outline possible City recourse to areas of non-compliance.

M/S: Giordano, Livengood.

Councilmember Polanski said she had the financial reports ending December 31, 2003, and December 2002, and passed them down to the City Attorney to help with his research; she also had the City Council minutes accepting the Terrace Gardens Annual Financial Report for 2002, the Terrace Gardens, Inc. Fiscal Year 2004 Operating Budget, the Fiscal Year 2003 Operating Budget for Terrace Gardens, and stated all of this was easily accessible through the City's web site; so, she did believe they had been complying as per the Regulatory Agreement and the bylaws.

Mayor Esteves said as a member of the City Council in the previous years, he remembered the Council did receive the audit documents, including the Budget documents, and on the 3<sup>rd</sup> one – compliance – he did not think that the City Council should micro-manage Terrace Gardens.

City Attorney Mattas confirmed, as part of item 6, that the Council may wish to, if it desired, withdraw that as part of the motion; he had confirmed the date previously – and was going to report that to the Council this evening, but he appreciated Councilmember Polanski raising that as well; the 2004 Terrace Gardens Budget item was approved previously by the Council; item 6 was approved previously by the Council

Councilmember Giordano said she would retract that from the motion.

VOTE ON MOTION: Ayes: 3 Noes: 2 (Esteves, Polanski)

Mayor Esteves said item 7, consideration of requesting staff to review and report to the City Council with respect to complaints about meals at the Terrace Gardens facility, was his request simply because he heard some complaints about the meals; and his point was not to question the Board, but he would like to know if the problem really existed, if the Council would like to help or could help – financially or otherwise; he heard there were some financial restrictions and inquired if the Council was willing to help or could it help.

MOTION to direct staff to look at the problem and come back with a recommendation of how much the Council could help or to see how much help was needed for the City Council to approve.

M/S: Esteves, Polanski.

Councilmember Polanski said the food had been an issue for many years and would continue to be one no matter whether the Council decided to subsidize or not; whomever ends up being on the Terrace Gardens Board of Directors would find that with the aging facility, there were a lot of other needs, and the Council may have to come to grips now with the fact that they have a facility that will require a lot of maintenance.

Councilmember Giordano said she would support the motion; she felt it was a low budgetary item to have staff involved in looking at the meals and giving the Council a report back.

Vice Mayor Gomez said he would be voting no on the motion; he felt it should wait until the budget process for this discussion because the daily meal program was being talked about, and he would like to hear from the management of Terrace Gardens during the budget process as to what kind of support they're looking for.

Isaac Hughes said everybody's talking about different things and now even talking about trying to resolve a problem of food that people complain about and, for all we know, there's people who work there that are complaining about the food; what the Council was not making clear, and what the City Manager might consider because he's involved with the Budget now, which monies come out of the City to help Terrace Gardens; inquired what was the responsibility of the City directly for the list of things being talked about; what was the literal responsibility of the City regarding the food; what was the responsibility of the City regarding the housing conditions; what was the responsibility of the City regarding the Board; he had not heard anything definitive, in other words, rules that are played by before you get into this "it's his fault/it's her fault" --. he did not see anything that was being clearly defined for the public; all we're hearing is bits and pieces of what you guys have discussed over the telephone or at other meetings in the past, but the public doesn't clearly understand what their responsibility is to manage -- whatever the problems may or may not be -- and whatever your responsibilities are to manage Terrace Gardens, whatever they may or may not be; and nobody clearly in the public knows about the land -- where it came from -- the monies that were involved.

Ola Hassan, proprietor, Ola's Corner, said he was glad he was here tonight to witness the whole meeting and hear all the conversations; what was really surprising to him was that he sees a lot of seniors from Terrace Gardens at the coffee shop and they talk about the poor food; he thought it was really unbelievable and spoke about the poor health of the seniors at Terrace Gardens; referred to the help the city of Pleasanton was providing help to its seniors, and felt Milpitas could also do this; suggested the Council put this into its agenda and accommodate the businesses that have something to render to the City of Milpitas, the seniors, and its residents.

Mr. Valore, speaking as a former member of the Terrace Gardens Board, suggested that before the Council did anything precipitously, the Council should evaluate the budget that was not yet submitted for 2005 and possibly take into consideration some recommended changes to the Regulatory Agreement, which was not submitted because of this hullabaloo that really did nothing for the residents other than delay some actions that he felt were significant and serious; he was asked to be on a subcommittee because of his background both as a manager and as a finance person, and they uncovered some significant changes that needed to be made from the standpoint of rents to be collected; and if those changes were not made, the City might find itself in the position of having to cough up more than just a few bucks for meals.

Mayor Esteves restated the motion to direct staff to look at the meal issue at Terrace Gardens and to come back with figures defining the issue, and if it's financial, how much, and alternatives, etc. so this Council could act whether it wants to help them financially or otherwise.

Acting City Manager Lawson inquired if it was the meals or was it the service. Mayor Esteves said it was the meal itself, basically the cost of the meals, having to pay for them when they are sick because they are obliged to pay the meal whether they are there or not; the cost of the meal was one issue but it was basically more financial from what he understood from the residents; he did not think they had a problem with the service -- from what he heard, the service was excellent.

VOTE ON MOTION:

Ayes: 3 Noes: 2 (Gomez, Polanski)

Mayor Esteves stated the motion passed; again, staff will have to look at this issue and see what the City Council could do.

Councilmember Polanski explained the reason she voted no was she believed the Council needed to look at everything involved with Terrace Gardens – with the Regulatory Agreement – as there was no longer a Board of Directors for Terrace Gardens; a budget had not been brought forth; there were a number of issues regarding the rents; when she was appointed to the Terrace Gardens Board of Directors, she thought she spent the first year investigating the problems with food, the problems with service, the problems with why they had to pay this or that; she thought the reserves had been for several years subsidizing the meal program, and that was why when the budget comes forward and the Regulatory Agreement, the Council would see that, for whatever reasons, previous Boards of Directors had decided to subsidize the meals and that didn't leave much money in reserves for some of the major repairs that were coming up; so, she voted no because she thought this needed to be looked at in its entirety and not just specifically with the meal portion.

Mayor Esteves said if Councilmember Polanski would make that as a motion, he could support it because he would really like the City to take a look at the whole picture; and the reason he put meals separately was he felt like it was a more immediate issue; hopefully, it could be addressed sooner since the whole picture could be a longer process.

Councilmember Polanski said she could make it a motion but right now, however, she did not know if there was a Board of Directors to bring the Regulatory Agreement forward; she did not know who to direct staff to go and investigate and to review all this; and she did not think a motion was needed because she thought it was going to become very obvious that the City was going to have to look at the entire big picture very shortly now.

City Attorney Mattas reported item 9 was consideration of request for a report from staff related to the listing of City Councilmembers who have served on the Terrace Gardens Board of Directors; staff was aware of the more recent ones, but if the Council would like, a report could be prepared from the beginning.

Mayor Esteves inquired what the objective of the request was. Councilmember Polanski stated she had no idea who made the request; but she did know that Elwood Johnson served, Jim Lawson served, Barbara Lee served, she served, and thought Councilmember Livengood said he served at one time during the initial set-up; and to her knowledge, those were the only Councilmembers who had ever served.

City Attorney Mattas said item 10 may be moot already – this was consideration of the City Council requesting Terrace Gardens' legal representatives to make a presentation before the City Council; Ms. Marshall had already done that this evening.

Councilmember Giordano requested the Council move past item 10 and requested notification be sent to Terrace Gardens of the actions the Council took tonight. Mayor Esteves stated he agreed.

Vice Mayor Gomez inquired if it would go to the Board or the residents. Councilmember Giordano clarified it would be the Management Board and Terrace Gardens in its entirety.

City Attorney Mattas said he thought the other items had already been dealt with (11, 12, and 13); and inquired, with the last request, was the notice to the Management Company and the Board Members, or to the actual residents as well. Councilmember Giordano said not the residents but the Management Company and the Board.

### **3. Ola's Exotic Coffee Inc. Economic Incentives**

Councilmember Polanski said she didn't need a presentation; she removed this item from the Consent Calendar at the last meeting because of concern for what the incentives were and because of the problems incurred with Campbell's Corners with this applicant. Councilmember Polanski said she thought Councilmember Livengood had made a statement about the City not getting involved in any kind of ventures with groups or developers or businesses because they usually fail, and she wanted to know what was being looked at as incentives.

Principal Analyst Cindy Maxwell responded a precedent was set with the request from Intersil to also have similar discussions that incentives as well; there were only two items she was aware of that had been offered in the past -- taking a look at what the actual increase in revenue would be to the City to see whether the City would be interested in providing any reductions in fees to the applicant; the second one had never been pursued but would be to see if they might find having some special allowance at a City facility for their workers as attractive for coming into the City or expanding.

Councilmember Polanski said that based on the comments Councilmember Livengood had made, she wanted to see what type of incentive it was and apologized to Mr. Hassan for not getting to his item on the last agenda.

Mayor Esteves suggested bringing the matter to the Economic Development Commission for their ideas.

Councilmember Giordano said she attended the "Good Morning Milpitas" last Friday where Assembly Member Torrico addressed this issue, so she was glad to see this come forward at the local level because it was being addressed at the State level; Assembly Member Torrico has introduced AB37, which gives new businesses immediate tax credits, and AB1580, which would give incentives to manufacturing companies. Councilmember Giordano said she thought we will be seeing more interest in this in our own City and when the Economic Development Manager is hired, she thought this should be one of the responsibilities to look into.

MOTION to direct staff to enter discussions with Ola's Exotic Coffee Inc. regarding economic assistance incentives that may be available.

M/S: Polanski, Gomez.

Ola Hassan said it was a privilege for him to address the Council tonight. Mr. Hassan further stated he wanted to correct Councilmember Polanski's comments stating that the City didn't have a problem with him; he had a problem with the City because he did everything right, it cost him \$1.7 million, and the City didn't given him a dime. Mr. Hassan explained his coffee business stating that he didn't need the City's money; his business would be good for the City, and he wanted the City's moral support.

VOTE ON MOTION:

Ayes: 5

**4.  
Calpine Los Esteros Critical  
Energy Facility Update**

Acting Planning & Neighborhood Services Director Heyden presented an update on the Calpine Los Esteros Critical Energy Facility Peaker Plant located in north San Jose. Ms. Heyden reviewed the status of Phase 2 consisting of increasing the output of the facility and improvements to convert it into a combined cycle generating facility. Ms. Heyden reported the settlement agreement the City entered into with Calpine required improvements for Phase 1 to be completed within six months of operation date and the additional improvements completed within six months of the Phase 2 operation date and the improvements were on schedule.

MOTION to note receipt and file.

M/S: Gomez, Livengood.

Ayes: 5

Mayor Esteves commented that the Council's policy was to adjourn at 11:00 p.m. and asked the City Manager if there were any remaining items that required attention. Acting City Manager Lawson asked that the Council proceed.

**5.  
Midtown Transit Sub-Area  
Visioning Project**

Acting Planning & Neighborhood Services Director Tambri Heyden reported this item was continued from the February 15, 2005, Council meeting and would include the same presentation given to the Council Transportation Subcommittee on the status of the Midtown Transit Sub-Area visioning project. Ms. Heyden further reported the final alternative concept

plans would be coming to the Council April 5, 2005. Ms. Heyden introduced the consultants Leslie Gould, lead consultant, and Bill Lee.

Leslie Gould reviewed the Milpitas Transit Area Concept Plan and responded to questions from the Council. Bill Lee presented market capacity and trends and economic and land use analysis and responded to questions from the Council. Ms. Gould reviewed the overall vision and goals for the preliminary concept plan, alternative policy choices, and key steps to move forward.

MOTION to note receipt and file the status report.

M/S: Gomez, Livengood.

Ayes: 5

Due to the lateness of the hour, Acting City Manager Lawson requested that item 13 be heard before the meeting was adjourned.

## **BIDS & CONTRACTS**

### **13. Recruitment Agreement Bob Murray & Associates**

Councilmember Polanski removed this item from the Consent Calendar and stated that she noticed in reviewing the item, it was for conducting a series of recruitments for the Fire Chief, Economic Development Manager, and Planning and Neighborhood Services Director and inquired what was the plan to recruit a new City Clerk.

Human Resources Director Cherie Rosenquist responded staff was already in the process of doing an in-house recruitment for City Clerk using HR staff.

Mayor Esteves asked how Bob Murray was selected. Ms. Rosenquist responded several companies that do executive recruitments were asked to submit proposals and in consultation with the City Manager, Bob Murray was selected. Mayor Esteves asked that in the future, all firms contacted be listed because he thought that was relevant information.

MOTION to authorize the City Manager to execute an agreement with Bob Murray & Associates, subject to approval as to form by the City Attorney, in an amount not to exceed \$45,000 for the administration of recruitment and selection for Fire Chief, Economic Development Manager, and the Planning and Neighborhood Services Director.

M/S: Gomez, Giordano.

Ayes: 3

Noes: 2 (Esteves, Polanski)

### **12. Amend Classification Plan**

This item was not discussed by the Council and no action was taken; the item was carried forward to the next City Council agenda.

## **ADJOURNMENT**

There being no further Council business, Mayor Esteves adjourned the City Council meeting at 11:22 p.m.

Gail Blalock  
City Clerk

**The foregoing minutes were approved by the City Council as submitted on April 5, 2005.**

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Gail Blalock  
City Clerk

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Date